



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 3

RIN 2900-AO09

Extension of Statutory Period for Compensation for Certain Disabilities Due to Undiagnosed Illnesses and Medically Unexplained Chronic Multi-Symptom Illnesses

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is issuing this final rule to affirm an amendment to its adjudication regulation regarding compensation for disabilities experienced by veterans who served in the Southwest Asia Theater of Operations during the Persian Gulf War. This amendment is necessary to extend the period during which disabilities associated with undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses must become manifest in order for a veteran to be eligible for compensation. Additionally, in this final rule, VA will correct the adjudication section title that was amended and published in the Federal Register on September 29, 2010, but inadvertently changed to the original title.

DATES: Effective Date: This rule is effective [insert date of publication in the FEDERAL REGISTER].

Applicability Date: The provisions of this final rule shall apply to all applications for benefits that are or have been received by VA on or after December 29, 2011, or that were pending before VA, the United States Court of Appeals for Veterans Claims, or the United States Court of Appeals for the Federal Circuit on December 29, 2011.

FOR FURTHER INFORMATION CONTACT: Nancy Copeland, Consultant, Regulations Staff (211D), Compensation Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 461-9685. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 29, 2011, VA published in the Federal Register (76 FR 81834) an interim final rule amending its adjudication regulation regarding compensation for disabilities suffered by veterans who served in the Southwest Asia Theater of Operations during the Persian Gulf War. In order to ensure that benefits established by Congress are fairly administered, VA extended the evaluation period in which disabilities associated with undiagnosed illnesses and chronic multi-symptom illnesses must become manifest in order for a veteran to be eligible for compensation. Accordingly, VA removed the date, "December 31, 2011" from 38 CFR 3.317(a)(1)(i) and added, in its place, December 31, 2016.

Interested persons were invited to submit written comments on or before February 27, 2012; VA received 169 comments in response to the interim final

rule. VA received comments from veterans service organizations and advocacy groups. VA also received comments and material from blogs and surveys established for Gulf War veterans who were deployed in the Southwest Asia Theater of Operations and also for those non-deployed during the Gulf War era. Lastly, VA received comments from military service members and their families.

General Comments

VA received general comments that were not associated with extension of the time frame for VA to continue to evaluate undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses in Persian Gulf War veterans. Some commenters asserted that undiagnosed illness is not fully understood even though 20 years have lapsed since the beginning of the Persian Gulf War. Others asserted that VA should revise the definition of Southwest Asia Theater of Operations or revise the type of service required and add medically unexplained chronic multi-symptom illnesses associated with different time periods. One commenter stated that VA examinations should be provided only by VA examiners and not contracted out. One commenter supported a minimum 30-percent rating for all Persian Gulf War veterans suffering from an undiagnosed illness. These comments are beyond the scope of this rulemaking. Therefore, VA makes no changes based on these comments.

Claims Specific Comments

VA received numerous comments from veterans regarding their individual claims for veterans benefits and comments from family members and friends in support of Gulf War veterans. These comments are beyond the scope of this rulemaking. Therefore, VA makes no changes based on these comments.

Post-9/11 [September 11, 2001] Veterans

Several commenters asserted the need for VA to consider those suffering from undiagnosed and medically unexplained chronic multi-symptom illnesses associated with the wars in Iraq, Afghanistan, and other Post-9/11 locations. As required by 38 U.S.C. 101(33), VA acknowledges that the Persian Gulf War period continues until an end date is established by Congress or Presidential proclamation. Section 1117(f) of the same title provides that the term "'Persian Gulf veteran' means a veteran who served on active duty in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War," and, as reflected in 38 CFR 3.317(e)(2), "[t]he Southwest Asia theater of operations refers to Iraq, Kuwait, Saudi Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations." As such, VA's regulatory provisions already pertain to Post-9/11 veterans who previously served or continue to serve in these theaters of operation. Further, any suggestions to expand the types of service to which

the statute and regulation apply are beyond the scope of this rulemaking. Therefore, we make no changes based on these comments.

Immediate Extension of the Effective Date

VA received comments expressing gratitude for the extension to December 31, 2016, and asserting that VA should extend the date immediately. One such commenter expressed the belief that "this amendment is reasonable and effective." With regard to the immediate extension of the expiration date, the interim final rule was effective immediately upon its date of publication, December 29, 2011, and extended the manifestation period of the regulation through December 31, 2016. This final rule merely keeps that regulation in effect. Accordingly, this final rule is effective upon publication.

Elimination of the Expiration Date

The majority of commenters, some of whom thanked VA for the extension to December 31, 2016, asserted that VA should completely eliminate the expiration date. Some provided statements such as "undiagnosed illnesses remain difficult to identify or treat"; "veterans may not realize they need help until after the five-year extension"; the presumption for Amyotrophic Lateral Sclerosis has no end date; diseases affecting Vietnam veterans are still emerging 50 years later with no end date for filing, and some Gulf War veterans are more ill than Vietnam veterans; "undiagnosed and chronic multi-symptom illnesses cause life-long disabilities" warranting no time restrictions on a veteran to seek presumptive

service connection; "medical conditions may take decades to manifest," and the Persian Gulf War period continues under 38 U.S.C. 101(33); and the regulations should cover veterans of the interim war period between the Gulf War and the Iraq War and those "on the ground as late as December 2011."

We will make no change based on these comments. Section 102(7) of the Persian Gulf War Veterans' Benefits Act states Congress' finding that further research must be undertaken to determine the causes of Gulf War veterans illnesses and that "pending the outcome of such research, veterans who are seriously ill as the result of such illnesses should be given the benefit of the doubt and be provided compensation to offset the impairment in earning capacities they may be experiencing." Congress contemplated an ongoing process for investigating the nature and causes of Gulf War veterans' illnesses. The statutory scheme reflects the hope that further research may eventually diminish the need for the presumptions in section 1117. Accordingly, we believe that extending the presumptive period for a significant, but not indefinite, period to permit further investigation is consistent with the goals of this statutory scheme.

In section 1117(b), Congress provided the Secretary with discretion to prescribe a presumptive period based upon, among other things, a review of credible medical or scientific evidence. As stated in the interim final rule, the Secretary is extending the presumptive period to December 31, 2016, in order to provide more time for scientific and medical research regarding diseases and illnesses that may be related to service in the Southwest Asia Theater of

Operations. Based on the current lack of scientific certainty surrounding the cause of illnesses suffered by Gulf War veterans, the Secretary's decision to extend the presumption period until December 31, 2016, is within the discretion given to him by section 1117.

Extension of the Expiration Date to 2018 or 2050

Two commenters thanked VA for extending the time frame to December 31, 2016, but asserted that since VA publicly announced the intention to draft a rule extending the presumptive date by an additional 7 years, VA should follow through by extending the date to December 31, 2018, versus December 31, 2016, in the final rule. One of these comments stated that a VA Web page describing that VA intended to extend the date through 2018 remained publicized and called this "overt duplicity" on the part of VA. The Web page information referred to by the commenter is not publicized at this time and was removed as soon as the error was noted. It appears the date publicized was mistaken and should have stated December 31, 2016. One commenter supported extending the time frame to 2050. The two previously established time frame extensions implemented by VA for medically unexplained chronic multi-symptom illnesses and undiagnosed illnesses that appeared in Gulf War veterans were 5-year periods. VA determined that it was appropriate to extend the time frame again by 5 years consistent with the extensions that have occurred in the past. Therefore, we make no change based on these comments.

Need for Further Research

Some commenters conveyed disagreement with the apparent premise of scientific studies that only those serving in certain areas during the Gulf War era are afflicted with Gulf War Syndrome and prone to adverse affects and toxins of war because this premise is based on “a flawed definition set by Congress in 1994.” Commenters in this group assert that ill Gulf War era veterans, including those both deployed and non-deployed, should be considered equally in regards to researching causative agents and treatments. Commenters asserted that non-deployed veterans are excluded from participation in the Gulf War Illness Registry and consideration of all Gulf War veterans, those deployed and non-deployed, would narrow the field of possible main causes down to causative agents and treatments, vaccines, immunizations, and infectious communicable diseases/biological weapons. Some commenters asserted the need for more time for investigation, medical and scientific research, and testing regarding undiagnosed and medically unexplained chronic multi-symptom illnesses. Others asserted the need for enhanced medical care for Gulf War veterans, testing for possible effects on offspring, and the need for VA to examine Gulf War veterans before VA makes a decision on an extension deadline.

VA recognizes the need for further investigation and scientific and medical research until more consistent evidence is available to the Secretary. This rulemaking finalizes an extension of the time frame in which manifestations of undiagnosed illnesses and medically unexplained chronic multi-symptom illnesses must appear in Gulf War veterans to be presumed as service-

connected diseases to allow time for further research. To the extent the comments call for specific types of research, they are outside the scope of this rulemaking. We, therefore, make no change based on these comments.

Technical Amendment

On September 29, 2010, VA published AN24, "Presumptions of Service Connection for Persian Gulf Service," in the Federal Register at 75 FR 59968 and replaced the title "§ 3.317 Compensation for certain disabilities due to undiagnosed illnesses" with "§ 3.317 Compensation for certain disabilities occurring in Persian Gulf veterans." Subsequently, on October 7, 2010, VA published an amendment to the final rule which removed a provision reserving to the Secretary the authority for certain determinations and, inadvertently, also switched the title back to its original form. Therefore, in this final rule, VA makes a technical correction to replace the current title with "§ 3.317 Compensation for certain disabilities occurring in Persian Gulf veterans."

Based on the rationale set forth in the interim final rule and this document, we are adopting the provisions of the interim final rule as a final rule with no changes other than correction of the title of § 3.317.

Paperwork Reduction Act

This document contains no provisions constituting a new collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rule will not affect any small entities. Only VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious

inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program number and title for this rule is 64.109, Veterans Compensation for Service-Connected Disability.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, approved this document on October 4, 2012, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: October 10, 2012

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

Accordingly, the interim final rule amending 38 CFR part 3 that was published at 76 FR 81834 on December 29, 2011, is adopted as a final rule with the following change:

PART 3 – ADJUDICATION

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. In § 3.317, revise the section heading to read as follows:

§ 3.317 Compensation for certain disabilities occurring in Persian Gulf veterans.

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[FR Doc. 2012-25353 Filed 10/15/2012 at 8:45 am; Publication Date: 10/16/2012]